

January 26, 2004

VIA HAND DELIVERY

Mr. Thomas M. Dorman
Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602

Drop Box
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JAN 26 2004
P.S. 1111

RE: Southeast Telephone, Inc.
Case No. 2003-00115

Dear Mr. Dorman:

Enclosed for filing please find an original and eleven (11) copies of the Kentucky ALLTEL, Inc. Brief with Respect to Arbitration Order Interconnection Agreement Unresolved Issue in the above-referenced case.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to call.

Sincerely,

WYATT, TARRANT & COMBS, LLP



Stephanie R. Conn

Legal Secretary to James H. Newberry, Jr.

Enclosures

Brief (original and eleven copies)

cc: Jonathon N. Amlung, Esq. (w/enclosures)
Steve Rowell, Esq. (w/enclosures)

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE COMMISSION

Petition of Southeast Telephone, Inc., for)
Arbitration of Certain Terms and)
Conditions of the Proposed Agreement with)
Kentucky ALLTEL, Inc., Pursuant to the)
Communications Act of 1934, as amended)
by the Telecommunications Act of 1996)

Docket No. 2003-00115

**KENTUCKY ALLTEL, INC. BRIEF WITH RESPECT TO ARBITRATION ORDER
INTERCONNECTION AGREEMENT UNRESOLVED ISSUE**

In response to the Commission's Arbitration Order in this proceeding, dated December 19, 2003 ALLTEL, under protest and while expressly reserving its right to appeal, prepared and provided Southeast Telephone, Inc. (Southeast) the interconnection agreement revised to comply with the Arbitration Order. The parties held a series of telephone conferences and resolved all but two issues in their attempt to produce an agreement that complies with the Arbitration Order. Subsequent to the parties' filing of their Joint Motion for Extension of Time to file the agreement, the parties have also resolved an additional issue and, therefore, only one issue remains that the parties are briefing to the Commission. The one issue is, "what is the interim cross-over between enterprise markets and mass market customers". The cross over is the number of DS0 loops serving a particular customer at which point it is determined to be more economic to serve by a DS1. The FCC has thus far indicated it is 4 DS0s.

In the agreement which ALLTEL provided to Southeast, it included language which, at least on an interim basis until the conclusion of the nine-month proceeding would have reflected that the FCC TRO Transitional four-line carve-out, Rule Section 51.319(d)(3)(ii), [appearing at page 25 of the rules] Transitional four-line carve-out, would be the interim cross over between

DS1 enterprise market customers and mass market customers. Southeast disagreed with ALLTEL's proposal and has insisted that it is up to this Commission to determine an interim carve-out until the conclusion of the nine-month proceeding. As the Commission has made no such determination and nor was such presented to the Commission in the arbitration, it is necessary for the Commission to determine whether it can determine solely as a matter of law, the applicable interim carve-out. If it cannot determine such solely as a matter of law, then additional proceedings are necessary (such as the TRO nine-month proceeding) in order to determine the carve-out.

Specifically ALLTEL proposed the following language:

89.2.4 Notwithstanding ALLTEL's general duty to unbundle local circuit local switching, ALLTEL shall not be required to unbundle local circuit switching for Southeast when Southeast serves or is to serve an "End User " with four (4) or more voice-grade (DS0) equivalents or lines to serve an End User with a DS1 or higher capacity Loop in any service area covered by this Agreement.

The above language is consistent with the FCC's TRO rule which provides as follows:

(ii) Transitional four-line carve-out. Until the state commission completes the review described in paragraph (b)(2)(iii) (B)(4) of this section, an incumbent LEC shall comply with the four-line "carve-out" for unbundled switching established in Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket In o. 96-98, Third Report and Order Fourth Further Notice of Proposed Rulemaking, 15 FCC Recd 3822-31, paras. 276-98 (1999), reversed and remanded in part sub. nm. United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002).

In adopting the above rule and four-line carve-out, the FCC recognized that this "four-line limit would include nearly all residential users and those business users that, because they had fewer than four access lines, were more similar to residential users than they were to large businesses." (TRO paragraph 430). The FCC's reasoning for selecting the four-line carve-out is discussed extensively in the TRO and UNE Remand Order. The Commission indicated that "the

evidence in the record demonstrates that it becomes viable to aggregate loops at a customer location and provide service at a DS1 capacity interface or higher”. (TRO paragraph 451). Specifically the FCC in finding unimpairment for DS1 service for Enterprise Customers clearly recognized and concluded that it is economically feasible at some number of DS0 lines purchased by a customer for the carrier to serve the customer on a DS1 rather than multiple DS0s, as service through a DS1 eliminates various operational issues and makes economic sense. In explaining its determination, the FCC said,

... for purposes of determining whether impairment exists according to our standard, we define DS1 enterprise customers as those customers for which it is economically feasible for a competing carrier to provide voice service with its own switch using a DS1 or above loop. We determine that this includes all customers that are served by the competing carrier using a DS1 or above loop, and all customers meeting the DS0 cutoff described below in paragraph 497 (emphasis supplied). (TRO footnote 1376).

While the FCC determined the state commission is best situated to identify potential enterprise customers, it also recognized there is a need for an interim cross over until the state commission completed its nine-month proceeding. Consistent with this discussion, the FCC in discussing Mass Market customers stated that “ the mass market for local customers consists primarily of consumers of analog “plain old telephone service” or “POTS” that purchase only a limited number of POTS lines and can only economically be served via analog DS0 loops” (emphasis supplied). (TRO paragraphs 459 and 497).

In the parties’ discussions with respect to this issue, Southeast has argued that the interim four-line carve-out is applicable only to the top 50 MSAs. While that may have been in the UNE Remand Order which adopted the four-line carve-out, it is no longer the rule as a result of the above quoted TRO Transitional Rule, which establishes the four-line carve-out as the interim transitional carve-out until the nine-month proceeding is completed.

Assuming, however, for the sake of argument that the FCC's transitional carve-out only applied to the top 50 MSAs, then this Commission can not decide an appropriate cross-over solely as a matter of law and must conduct further proceedings to develop a factual record upon which to establish even an interim cross-over. This arbitration has not addressed this issue and obviously there would be significant factual development and factual evidence which must be presented to the Commission before it could make even an interim determination, unless it applies the FCC Transitional Rule.

The FCC clearly intended for the state commission to ultimately make this determination. The FCC indicated the following:

... as part of the economic and operational analysis discussed below, a state must determine the appropriate cut-off for multi-line DS0 customers as part of its more granular review. This cross-over point may be the point where it makes economic sense for a multi-line customer to be served via a DS1 loop. We expect that in those areas where the switching carve-out was applicable, (i.e., density zone 1 of the top 50 MSAs), the appropriate cut-off will be four lines absent significant evidence to the contrary. ... accordingly, we authorize the states, within nine months of the initial date of this Order to determine the appropriate cross-over point. (TRO paragraph 497).

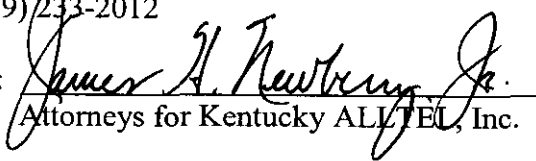
However, the FCC was very sensitive to the potential impact of setting an interim cross-over that is too high. In discussing its Transition Rules the FCC emphasized that it was necessary to minimize potential service disruptions that could occur from changes to the interim cross-over. It expressly retained the four-line carve-out from the unbundled local switching obligation on an interim basis pending state commission determinations pursuant to the framework set forth in the rules to minimize customer impact. (TRO paragraph 525). The FCC recognized that if it did not retain the carve-out, then "carriers could potentially accumulate more multi-line DS0 customers while states pursued their inquiries, only to risk losing those customers after states make their determinations pursuant to the framework described above." The FCC, in

order to avoid service disruptions and customer confusion created by interim further accumulation of multi-line DS0 customers prior to the state's granular determination of the appropriate cross-over, said "by extending the four-line carve-out on an interim basis, pending such state commission action, we seek to avoid service disruptions that may result from expanding and then possibly reducing the eligibility for local circuit switching in this manner." (TRO paragraph 525). This Commission, like the FCC, should be sensitive to customer affecting decisions and not attempt to impose a higher cross-over until full granular analysis, as ALLTEL requested but was denied in these proceedings, and as is required in the nine-month TRO proceeding.

The only cross-over which this Commission can and should impose on an interim basis as a matter of law is the FCC's four-line carve-out. If it chooses to select another cross-over point, then it is required to conduct the granular analysis at this time. The Commission should, therefore, affirm that on an interim basis the interconnection agreement that must be filed pursuant to the Arbitration Order should reflect a four-line carve-out or, alternatively, the Commission should schedule proceedings and allow the parties to file testimony and factual evidence upon which the Commission can determine an appropriate cross-over.

Respectfully submitted,

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By: 
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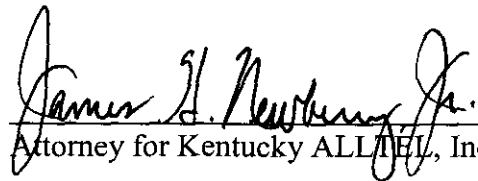
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Kentucky ALLTEL, Inc. Brief with Respect to Arbitration Order Interconnection Agreement Unresolved Issue was served upon SouthEast Telephone, Inc. by mailing a copy of same to:

Jonathon N. Amlung, Esq.
Attorney for Petitioner
1000 Republic Building
429 W. Muhammad Ali Blvd.
Louisville, KY 40202

This the 26th day of January, 2004.


Attorney for Kentucky ALLTEL, Inc.